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MATSON TERMINALS, INC.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

MATSON TERMINALS, INC.,)	Case 20-CA-178312
)	
and)	RESPONDENT MATSON TERMINALS,
)	INC.'S REPLY BRIEF TO GENERAL
HAWAII TEAMSTERS & ALLIED)	COUNSEL'S ANSWERING BRIEF TO
WORKERS UNION, LOCAL 996)	EXCEPTIONS TO THE
)	ADMINISTRATIVE LAW JUDGE'S
)	DECISION (DATED FEBRUARY 20,
)	2018); CERTIFICATE OF SERVICE
)	
)	

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**RESPONDENT MATSON TERMINALS, INC.’S REPLY BRIEF TO GENERAL
COUNSEL’S ANSWERING BRIEF TO EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE’S DECISION (DATED FEBRUARY 20, 2018)**

I. Introduction

Matson Terminals, Inc. (“Matson”) hereby files its Reply Brief to the General Counsel’s Answering Brief. In its Exceptions, Matson established (A) that the reassignment of Hilo barge menu work was not material, substantial, and significant; and alternatively (B) that Matson was legally obligated to give such work to the ILWU wharf clerks and therefore had no duty to bargain about it. As described below, the Answering Brief fails to refute Matson’s points.

II. Discussion

A. The reassignment of barge menu work was not material, substantial, and significant

The General Counsel’s Answering Brief fails to show how the reassignment of barge menu work was material, substantial, and significant.¹

First, the General Counsel does not dispute that the reassignment had absolutely no impact upon wages and hours.

Second, the General Counsel does not dispute that cases relied on in the ALJ Decision – including *Regal Cinemas, Inc.*, *Cincinnati Enquirer, Inc.*, *Hill-Rom Co.*, *United Technologies*

¹ In a footnote, the General Counsel states that Matson failed to raise this argument before the ALJ. However, this point is unavailing. As a threshold matter, it is the General Counsel’s burden to prove that the change is material, substantial, and significant; Matson does not have the burden to prove a negative (*i.e.*, the lack of substantiality) during the hearing. In any event, the issue was raised to the ALJ, and there was no lack of notice. First, Matson’s brief to the ALJ addressed the insubstantiality of the reassignment, pointing out that nothing in the record indicates any loss of hours or compensation due to the reassignment. *See* Matson’s 10/2/17 Post-Hrg Brf. at 6. Second, both the General Counsel and the ALJ were clearly aware that the General Counsel had to prove that the change was material, substantial, and significant. *See* GC’s 10/2/17 Post-Hrg Brf at 3-4 (arguing that the reassignment constitutes a “material and substantial change”); ALJ Decision at 5 (noting that the change must be “substantial and material” to trigger bargaining). Third, the ALJ did in fact address Matson’s insubstantiality argument, albeit erroneously. *See* ALJ Decision at 5 n. 7 (recognizing Matson’s argument that the change did not have sufficient impact on the Supervisors, and rejecting such argument by wrongly suggesting that Matson had the burden to show that the reassignment was “immaterial, unsubstantial, and insignificant”).

Corp., and *Bay Shipbuilding* -- are inapplicable because they involve the removal of positions or personnel from the bargaining unit, which is vastly different than the present situation.

Similarly, although the General Counsel's Answering Brief cites to several cases relating to work transfers (*see* Ans. Brf. at 6, n. 28), none of those cases abrogate the longstanding rule that a work transfer must be material, substantial, and significant in order to trigger a duty to bargain. Furthermore, like the cases cited by the ALJ, the cases cited by the General Counsel also involve easily distinguishable facts such as the removal of entire positions or personnel from the bargaining unit. *See Westinghouse Elec.*, 313 NLRB 452 (1993) (employer had a duty to bargain about layoff decision); *Hampton House*, 317 NLRB 1005 (1995) (employer had duty to bargain as to five employees who were promoted from bargaining unit into supervisory positions but still performed their same bargaining unit work); *Kohler Co.*, 273 NLRB 1580 (1985) (employer had duty to bargain about removal of the entire stock clerk position from the bargaining unit); *Stone & Thomas*, 221 NLRB 573 (1975) (employer had duty to bargain about physical transfer of employees to different job sites, which also involved some employees having different hours/schedules or switching to different positions).

Third, although the General Counsel indicates that the reassignment occurred on the day that the Union was certified,² even the ALJ Decision itself does not rely upon such timing as a basis for its findings. In any event, this does not show how the reassignment was material, substantial, and significant, nor is there a rule that a change becomes material, substantial, or significant because it occurred at the time of the union's certification.

Fourth, the General Counsel does not and cannot deny that the majority of the Supervisors' duties remained unchanged. Although the General Counsel cherry-picks isolated

² The reassignment actually was implemented in June 2016, after the May 2016 date of certification.

testimony from the representation case to argue that barge menu work was significant, this is unavailing. As explained below, the record shows the opposite – i.e., that the barge menu work was only a very small part of the Supervisors’ overall duties.

The Supervisors generally rotate through four positions: (1) Timekeeper/Dispatcher, (2) Yard Supervisor, (3) Barge Planner, and (4) Barge Supervisor (which is the only position that handles barge menu work). Jt. Ex. E at 53-58, 60. During the representation hearing, although Vice President Rusty Leonard gave some testimony about these positions, it was Big Island Terminal Manager Michael Leite – who held the Supervisor position for five years just prior to the hearing (*id.* at 66) – who explained the duties in more detail. As the record makes clear, the Supervisors’ duties are expansive and go far beyond barge menu work.

- Timekeeper/Dispatcher: The Supervisor makes assignments/schedules for the longshore group (*e.g.*, he allocates individual longshoremen to certain operations and times), notifies the longshoremen of their assignments by posting call-out sheets and making audio recordings, tracks and calculates the hours for each longshoreman on a daily basis, inputs information in the computer regarding their assignments and hours, submits spreadsheets so the workers can get paid, calls in additional workers (although it is the Barge Supervisor who initially decides that more workers are needed), and works with the Barge Supervisor to resolve manning issues. *Id.* at 53-54, 80, 82.
- Yard Supervisor: The Supervisor controls the traffic flow in the container yard, which includes assisting community truckers with finding containers, plotting out parking areas, and handling auto operations. *Id.* at 56. In more detail, this includes directing longshoremen to free up chassis (by removing containers from atop the chassis and stacking those containers), to put autos inside empty containers, to unstack chassis that have been delivered from Honolulu, and to stack flatracks to be shipped out. *Id.* at 86-87.
- Barge Planner: The Supervisor constructs the loadback plan (*i.e.*, the plan for loading containers onto the empty barge) by deciding which containers should be loaded and which can be held back for the next barge, where containers should be placed on the barge, and in what sequence. In doing so, he has to evaluate and balance numerous considerations, such as priority containers, chassis availability (*e.g.*, if chassis are needed in the yard, containers on chassis might be loaded earlier to free up those chassis), the list and trim of the boat as it is affected by the weight and balance of

containers, and fitting containers of certain sizes into the limited slots on the barge. This process for constructing a single plan takes an entire day. *Id.* at 68-69.

- Barge Supervisor: The Supervisor bears ultimate responsibility for what happens on the barge. *Id.* at 71. The Supervisor starts his work approximately 2 ½ hours before the shift starts: He comes in to prepare and organize the discharge and the load back of the barge, which helps maximize the efficiency of the operations. This includes verifying all the containers going on and off the barge, checking how many chassis and other pieces of equipment are available in the yard for the discharge operations, assessing the availability of space in the container yard, and assessing which containers on the barge are “hot containers” (priority containers) that must be discharged earlier. *Id.* at 69, 84.

During the shift, he physically inspects the barge and the containers to be discharged and conducts the safety and informational meeting. *Id.* at 84. As the crane operators move containers, he notates the moves (*id.* at 85) and repeatedly evaluates changing circumstances to decide whether and how to deviate from the discharge plan or loadback plan. This means taking into consideration customer priorities and time limitations (*Id.* at 56, 72), crane breakdowns, the late arrival of the barge, weather, the listing of the boat, missing containers (*i.e.*, containers that are not in their designated location on the discharge plan), and last-minute containers (*i.e.*, containers that arrive late to the yard and need to be added to the loadback plan). *Id.* at 85-86. When the Supervisor makes deviations, he gives notice to and coordinates with the office (including the Barge Planner) as to such deviations. *Id.* at 72, 85. These changes that the Barge Supervisor must handle occur “frequently” in the discharge plans and load plans in every operation. *Id.* at 77.

When other challenges arise (such as if a container needs to be discharged but the crane operator’s access to the container is obstructed by a high stack of containers), he decides how to best proceed. *Id.* at 70-71. In addition, due to adverse conditions such as inclement weather, he can decide to stop operations entirely or to have containers set on the grounds rather than on the chassis. *Id.* at 86. As noted above, the Supervisor also decides when to call for additional manning and resolves manning issues. *Id.* at 80. Moreover, when the Terminal Manager is not present (which is on weeknights and all weekends, and when sick or on vacation), the Supervisor runs the overall operations. *Id.* at 56, 80.

Supervisor job duties are also addressed in the job descriptions for Senior Supervisor and Supervisor.³ *See* Jt. Ex. E at 140-42, 143-45. The job descriptions refer to not only the four above-described rotations (*id.* at 140 at ¶1, *id.* at 143 at ¶1) but also a range of other duties such as managing the use of the company’s container-handling equipment (*e.g.*, top picks, forklifts,

³ There is no material difference between the Supervisor and Senior Supervisor position. *See id.* at 60.

cranes, and barges), completing documentation of cargo booking, collecting COD payments, preparing proper documentation for ship stability, understanding and administering the collective bargaining agreement, adjusting grievances and resolving disputes, monitoring the work area to ensure compliance with safety regulations, investigating incidents and preparing accident reports, enforcing company policy regarding use of safety equipment, directing manpower callouts, enforcing company policy regarding start and stop times (including breaks and lunches), and assuming the responsibilities of the Terminal Manager in his absence. *See id.* at 57-59, 140-42, 143-45.

In light of the foregoing, it is clear that barge menu work was just a very small part of the Supervisor's overall duties:

- As described above, the Supervisors have an extensive range of duties, all of which remain intact and unchanged.
- To further emphasize the point, barge menu work is performed by only one of the four rotation (the Barge Supervisor rotation). Therefore, three of the four rotations (Timekeeper, Yard Supervisor, and Barge Planner) are completely unaffected by the reassignment of barge menu work.
- Even within the Barge Supervisor rotation, barge menu work is only a small fraction of the overall duties. As Mr. Leite testified, other duties include reviewing and revising the discharge and load plans, verifying containers, checking equipment in the yard, assessing priority containers, inspecting the barge and containers, conducting safety meetings, notating crane moves, assessing ongoing conditions and deciding on deviations from the discharge and load plans (which occurs "frequently" on every operation), coordinating deviations with the office, and resolving manning issues.

In fact, the barge menu work was arguably among the least significant of Barge Supervisor duties in that it is a purely ministerial act, devoid of decision-making. It is literally nothing more than reading aloud already-decided crane and rig moves. *See* Jt. Mot. at 5 (par. 10(b)).⁴

⁴ The Supervisors make many decisions including (as noted above) how to construct the loadback plan in advance of the operations, and how to deviate from the loadback plan during the operations. But the reading aloud of the plan to the crane operators is a ministerial act that occurs after the Supervisor has made decisions and deviations.

- Barge menu work is limited to only barges with onboard cranes. See Jt. Mot. at 5 (par 10(b)). This further reduces the role of barge menu work because the Barge Supervisor works on two different types of barges – (1) a barge with an onboard crane (“crane barge”), and (2) a barge without an onboard crane and on which containers and loose automobiles are rolled on and off (“Ro-Ro barge”). See Jt. Ex. E at 51-52, 67. In any given week, only one crane barge and one Ro-Ro barge service the Big Island; in other words, although Matson’s *fleet* has multiple crane barges, only one of them (usually the Mauna Loa) services the Big Island in any period. See *id.* Put another way, the Barge Supervisor splits his attention between the crane barge (which has barge menu work) and the Ro-Ro barge (which does not have barge menu work).

The General Counsel relies specifically upon isolated testimony from Mr. Leonard to suggest that barge menu work is the primary focus of the Barge Supervisor. That reliance is misplaced for various reasons. For one thing, the record – largely consisting of Mr. Leite’s testimony – shows that the Supervisors’ overall duties involve far more than barge menu work.⁵ In addition, Mr. Leonard was not asked to testify exhaustively about Barge Supervisor duties, nor does he even say that barge menu work is the Barge Supervisor’s primary task. Rather, Mr. Leonard says that the Barge Supervisor “directs the discharging and/or loading of the vessel throughout the operation, directing the crane operators, drivers, that sort of thing. Basically in charge of the operation.” The concepts of “direct[ing]” and being “in charge of the operation” encompass the entire gamut of the above-described duties, some of which are done even before the crane operators and drivers show up. Mr. Leonard’s use of the phrase “that sort of thing” further shows that duties he listed are not exhaustive. Given Mr. Leite’s extensive testimony (as well as the cursory and generalized nature of Mr. Leonard’s testimony) on this issue, the record shows that the Supervisors perform a vast range of duties and are not focused on barge menu work.

⁵ Again, Mr. Leite has been based on the Big Island and served for five years as a Supervisor at the Big Island operations just prior to the representation hearing. Mr. Leonard is located in Honolulu, not the Big Island.

Fifth, although the General Counsel cites to the Supervisor and Senior Supervisor job descriptions, those documents also do not establish that barge menu work was of particular significance to the position. The job descriptions use the term “barge operations” but do not define the term to mean only barge menu work; rather, “barge operations” logically covers the entirety of Barge Supervisor duties which all relate to servicing the barge. Furthermore, as discussed above, the job descriptions reflect many duties other than barge menu work.

Sixth, although the General Counsel argues that the reassignment is material, substantial, and significant because it affects all members of the bargaining unit, this is unavailing. As an initial matter, it is factually incorrect; some of the Supervisors focus on the Timekeeper and Barge Planner positions, and at least one of the seven Supervisors does not rotate at all into the Barge Supervisor position. *See* Jt. Ex. E at 75, 95.⁶ In any event, the ALJ Decision itself did not rely upon any finding that all (or many) members were affected. In addition, the Board has not promulgated such a rule. To the contrary, in many instances, changes affecting many or all bargaining unit employees have been found to be not material, substantial, and significant. *See Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976) (requiring all unit employees to use time clocks did not require bargaining); *MMC Materials, Inc.*, 2005 NLRB LEXIS 538 (2005) (changing drivers’ schedules and plant operators’ duties did not require bargaining); *J.W. Fergusson & Sons, Inc.*, 299 NLRB 882, 892 (1990) (changing unit employees’ breaks did not require bargaining); *The Fremon-Rideout Health Group*, 357 NLRB 1899, 1904 (2011) (changing the general attendance policy did not require bargaining); *McKesson Corp.*, 2014 NLRB LEXIS 851 (2014) (changing gym benefits for all unit employees did not require bargaining), *adopted in* 2015 NLRB LEXIS 722 (2015).

⁶ The Stipulation states that barge menu work has been performed by Supervisors and Senior Supervisors, but it does not state that all Supervisors and Senior Supervisors were doing the barge menu work.

Furthermore, in cases where the Board found that changes to an individual employee's duties were not material, substantial, and significant, the Board did so by evaluating the impact on that individual employee, and not by relying on the fact that only one employee was affected.⁷ *See, e.g., Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060 (2006) (removal of half of the employee's duties did not amount to a material, substantial, and significant change where his pay and hours did not change and the other half of his duties continued and expanded); *Alamo Cement Co.*, 227 NLRB 1031 (1985) (changes in employee's duties, classification, and pay did not amount to a material, substantial, and significant change where he continued to do most of the same work).

Seventh, to the extent there is an ambiguity as to the significance of the barge menu work, that ambiguity weighs against the General Counsel who has the burden to prove the change is material, substantial, and significant. *See* Exceptions at 5-6.

Eighth, the General Counsel argues that, where Matson cites to wharf clerks performing barge menu work on the West Coast and Kauai, this suggests that the work is material, substantial, and significant. However, such citation is not an admission that reassigning barge menu work was a material, substantial, and significant change to the Supervisors' overall duties.

B. Matson was legally obligated to reassign the barge menu work and therefore did not have to bargain about it

Even assuming *arguendo* that the reassignment were a material, substantial, and significant change (which it in fact was not), Matson was legally obligated to make the reassignment and therefore still had no duty to bargain about it. The General Counsel's arguments otherwise are unavailing.

⁷ Put another way, the Board gave no indication that the outcome would have been different if the change had affected multiple workers.

First, the General Counsel argues that it would be “strained” to interpret “directing and executing the flow of cargo” as encompassing the directing of crane operators because such work has not been done by wharf clerks since at least 2006. However, a purely textual analysis does not depend upon what the crane operators have actually done.

Second, the General Counsel asserts that the LOU is intended to address the assignment of new duties. While that is true, the LOU also shows the parties’ understanding as to what duties were already within the ILWU’s jurisdiction. Section (e) of the LOU defines “traditionally wharf clerk functions” as including “directing and executing the flow of cargo,” and sections (b) and (e) of the LOU make it mandatory for the wharf clerks to perform such work. *See* Jt. Ex. J at 37 (“All traditional wharf clerks’ work, including work modified by new technology, shall be assigned to wharf clerks in accordance with Section 2 of the Agreement”).

Therefore, although Big Island wharf clerks had not previously been doing barge menu work, it was nevertheless within their jurisdiction (as further evidenced by wharf clerk duties traditionally performed on the West Coast and Kauai), and so there was no need to agree to add it to their jurisdiction.

In a footnote, the General Counsel curiously asserts that the LOU is not a work-preservation argument. This is irrelevant: The LOU need not qualify as a work preservation agreement in order to have significance in this case. As noted above, the LOU is essentially a work *jurisdiction* agreement, recognizing what has always been within the wharf clerks’ jurisdiction (“directing and executing the flow of cargo”) as well as providing a process for adding duties consistent therewith.

Third, the General Counsel argues that the LOU requires Matson only to meet and discuss work jurisdiction issues with the ILWU, and not necessarily to assign duties to the wharf


clerks. However, both sections (b) and (e) of the LOU clearly state that traditional wharf clerk work (including “directing and executing the flow of cargo”) “shall be assigned to wharf clerks[.]”. Alternatively, such discussion occurred as a prerequisite to the mandatory assignment. *See* Jt. Mot. at 8 (wharf clerks performed barge menu work “following and due to Respondent’s and the ILWU’s discussions about wharf clerk duties pursuant to the CBA”).

Fourth, the General Counsel argues that, even if the LOU required Matson to reassign the barge menu work to the wharf clerks, Matson still had to bargain with the Union about the reassignment. This is not accurate. As stated in the caselaw cited in Matson’s Exceptions, if an employer has a legal obligation to undertake a certain action, the employer may implement it without bargaining.

III. Conclusion

For the foregoing reasons, the General Counsel’s Answering Brief fails to show that the reassignment of barge menu work was a material, significant, and substantial change, or that Matson did not have a legal obligation to reassign the work to the wharf clerks. Accordingly, Matson’s Exceptions should be granted.

DATED: Honolulu, Hawaii, May 1, 2018.



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CERTIFICATE OF SERVICE

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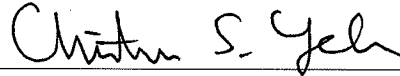
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A handwritten signature in black ink, reading "Christopher S. Yeh", written over a horizontal line.

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